(2)

No. 09-216

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

WALTER A. McNEIL,

Petitioner,

v.

MARK JAMES ASAY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The Respondent disputes that the Question Presented, as stated in the Petition, adequately sets forth the questions the Court would need to decide if it grants review. Thus, he presents his own version:

1. In a capital habeas proceeding, does 28 U.S.C. § 2254(i), which provides that the "ineffectiveness or incompetence" of post-conviction counsel "shall not be grounds for relief in a proceeding arising under section 2254," prohibit a district court from ever equitably tolling the limitations period for habeas petitions based on the affirmative misconduct of court-appointed counsel?

2. In light of this Court's holding in *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), that a Florida application for post-conviction review remains pending for purposes of tolling the AEDPA limitations period between the time a Florida appellate court issues an opinion affirming the trial court's denial of the application and the time the appellate court issues its mandate, when does the period begin to run again when a Florida appellate court refuses to issue a mandate?

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SUPREME COURT OF THE UNITED STATES

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Respondent's Brief in Response to the Petition for a Writ of Certiorari

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The respondent Mark James Asay readily concedes that the petition raises an extremely important question of federal law on which the courts of appeals are deeply divided. Mr. Asay files this brief in opposition in order to provide a more complete and accurate statement of facts than presented in the petition, to point out that this may not be the best vehicle to resolve the primary question presented, and to address a jurisdictional wrinkle not adequately addressed in the petition.

STATEMENT OF THE CASE

A. The Deadline for Mr. Asay's Habeas Petition

Although the district court stated that the one-year limitations period for Mr. Asay's habeas petition expired on January 17, 2005, the facts related in its order demonstrate that the period continued beyond that date either as a result of statutory tolling or separate equitable tolling unrelated to the conduct of Mr. Asay's counsel.

Mr. Asay's conviction and death sentence became final in 1991, when this Court denied his petition for a writ of certiorari on his direct appeal. He filed his first application for state post-conviction relief in 1993, and it remained pending until after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 (1996). The one-year AEDPA limitations period began to run on December 1, 2000, when the Supreme Court of Florida issued its mandate after affirming the denial of the first application. *See* 28 U.S.C. § 2244(d)(2) (2006) (providing that the one-year limitations period is tolled as long as a properly filed application for state post-conviction review is pending); *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999) (holding that when a state post-conviction proceeding is pending as of April 24, 1996, the one-year limitations period begins to run when the proceeding is finally concluded), *cert. denied*, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000).

The period ran for 327 days until October 25, 2001, when Mr. Asay filed his second application for state post-conviction relief, a petition for a writ of habeas corpus filed directly in the Supreme Court of Florida. Pursuant to § 2244(d)(2), this tolled the limitations period until October 4, 2002, when the state supreme court denied rehearing of its denial of the habeas petition.[1] Thus, at that point, Mr. Asay had 38 days left to file a federal habeas petition.

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[1] No mandate issued because this was an original habeas proceeding in the Supreme Court of Florida, not an appeal. *Johnson v. Singletary*, 618 So. 2d 731 (Fla. 1993).

The period ran for another 12 days until October 17, 2002, when Mr. Asay filed his third application for state post-conviction relief, a motion in the trial court seeking relief under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Thus, he had 26 days left on the limitations period to file his federal habeas petition after the third post-conviction proceeding concluded.

The Supreme Court of Florida affirmed the trial court's denial of the application by opinion dated December 20, 2004. If that is the date that the application is deemed to have been finally denied, then Mr. Asay's habeas petition was due January 17, 2005, as represented in the petition. However, the district court noted that there was substantial confusion as to whether the December 20, 2004, opinion finally disposed of the post-conviction proceeding. (Pet. App. at A60-61.)

When the state supreme court affirmed the trial court's denial of Mr. Asay's first application for post-conviction review, it issued a mandate a couple of weeks following its opinion. *See* Fla. R. App. P. 9.340(a) (2004) (providing that clerks of appellate courts in Florida must issue a mandate within fifteen days of an appellate opinion unless otherwise ordered by the court). The district court used the date of the mandate, and not the date of the opinion, as the date the AEDPA period started running again under § 2244(d)(2). When no mandate issued after the December 20, 2004, opinion affirming the denial of the second state post-conviction application, Mr. Asay wrote a letter to the clerk of the state supreme court inquiring when it would issue. In a letter dated January 31, 2005, the clerk responded that no

mandate would issue.[2] The district court held that, as a matter of either statutory or equitable tolling, the AEDPA period did not begin to run again until the date of that letter. (Pet. App. at A60-61 n.25.) The State has not sought to challenge this ruling either in its petition for leave to appeal to the court of appeals or in its petition to this Court. Thus, the AEDPA period did not expire until Monday, February 28, 2005, before taking into account the possibility of equitable tolling based on the conduct of counsel.

B. The Date Mr. Asay Filed His Habeas Petition

The district court held that Mr. Asay "initiated" his federal habeas proceeding by filing a *pro se* letter with the court on February 8, 2005. (Pet. App. at A-10.) On August 15, 2005, Mr. Asay's counsel filed a formal petition for writ of habeas corpus. While the bulk of the district court's opinion refers to the latter date as the date he filed his petition for purposes of the AEDPA period, the court held, in the alternative, that it was filed on February 8, 2005, when Mr. Asay filed his *pro se* letter. (Pet. App. at A-60.) As the court noted, the State itself referred to this letter

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[2] On July 31, 2006, the undersigned counsel filed a formal motion on Mr. Asay's behalf asking the state supreme court to issue its mandate, explaining the importance of the mandate for calculating the AEDPA deadline, and citing case law from Florida, the Eleventh Circuit, and this Court that all indicate that a post-conviction proceeding remains pending between the date of an opinion affirming the denial of relief and the date of the mandate. The supreme court denied that motion without explanation on August 16, 2006.

as a habeas petition. (*Id.*) Thus, under this alternative holding, Mr. Asay's petition was timely even if the conduct of his counsel did not equitably toll the AEDPA period. The State did not seek to challenge this ruling either in its petition for permission to appeal to the Eleventh Circuit or in its petition to this Court.

C. Facts Supporting Application of Equitable Tolling

Mr. Asay was originally represented by lawyers from Florida's Office of Capital Collateral Regional Counsel ("CCRC"), a publicly funded law office created for the sole purpose of providing representation to indigent death row inmates. In July 2002, while his state habeas petition (the second post-conviction proceeding) was pending in the Supreme Court of Florida and he still had 38 days left in the AEDPA period, Mr. Asay's CCRC lawyer wrote him to advise that she had filed a motion for rehearing because the court had denied the petition. She advised that if that motion were denied, she would file another post-conviction motion in the trial court based on this Court's *Ring* decision, which had just come down. She advised that she would likely file that motion within 30 days of the denial of rehearing and that this would again toll the AEDPA limitations period. As noted above, she filed that motion on October 17, 2002, just 12 days after the denial of rehearing. This left 26 days remaining in the AEDPA period.

In July 2003, while the *Ring* motion was still pending, Mr. Asay received a letter from attorney Dale G. Westling, Sr., indicating that Mr. Westling, a private attorney, had been appointed by the Florida court to take over as Mr. Asay's counsel after the CCRC office for Mr. Asay's region of Florida had been disbanded. Mr. Asay immediately wrote Mr. Westling to inquire whether Mr. Westling was licensed

to practice in federal court and to ask that Mr. Westling immediately address this matter because "my case is quickly advancing to the Federal Appeals level." Mr. Westling promptly responded and indicated that he had been a member of the local federal bar for 28 years. Mr. Asay replied with another letter that emphasized that his upcoming federal habeas petition was very important and advised that the CCRC lawyer had told him the petition would be due around 30 days after the *Ring* motion was finally denied.

In March 2004, while the *Ring* proceeding was still pending, Mr. Westling advised that he wanted to bring on a new lawyer, Mary Catherine Bonner, whom he described as specializing in federal habeas work. About the same time, Ms. Bonner wrote Mr. Asay to explain that she wanted to get started right away preparing for the federal petition because it would take time for her to get up to speed. She boasted of her federal habeas experience, specifically including expertise in calculating the AEDPA deadline, and about the amount of time she spends in preparation.

A few weeks later, Mr. Westling sent another letter to Mr. Asay again touting Ms. Bonner's expertise. He went on to advise:

> She is especially qualified because she has pursued "time barred" proceedings in the past. As you know, your time to file a habeas proceeding probably expired some years ago.

This last statement was inaccurate, of course, as Mr. Asay had 26 days left on the limitations period once the *Ring* proceeding was concluded.

After speaking with Ms. Bonner about the subject, Mr. Asay became very concerned that neither of his lawyers understood the AEDPA limitations period,

and he filed a *pro se* request for a status conference with the state trial court to help him to ascertain the status of the AEDPA period. The trial court struck the *pro se* motion as unauthorized because it was not filed by Mr. Asay's appointed counsel, Mr. Westling. The order went on to state that Mr. Westling "meets the statutory requirements and has the high ethical standards necessary to represent a defendant in a capital case."

Mr. Asay wrote to Mr. Westling imploring him to analyze the AEDPA deadline and advise when the federal habeas petition would be due. After the Supreme Court of Florida entered its order affirming the denial of the *Ring* motion, Mr. Asay wrote Mr. Westling with his own calculations of the AEDPA deadline. He calculated that the habeas petition had to be filed 24 days after the court issued its mandate. He sent a copy of this letter to Roger Maas, the executive director of the Florida Legislature's Commission on Capital Cases. Mr. Maas wrote back that he had spoken with Ms. Bonner, and he assured Mr. Asay that Ms. Bonner was aware of the timing issues and would "give them due consideration."

Mr. Asay spoke to Ms. Bonner on January 10, 2005, and instructed her to file his federal habeas petition within 24 days of the mandate by the Supreme Court of Florida. He followed this up with another letter to Ms. Bonner expressly directing her to file his federal habeas petition within the AEDPA period. He went on to state:

> It is my belief that under all applicable guidelines my Rule 2254 Petition must be properly filed no more than twenty-four days following the Mandate of my 2nd Rule 3.850 which was affirmed by

> The Florida Supreme Court on December 20th 2004. This Mandate is due in January 2005.

He copied Messrs. Moss and Westling with this letter.

Around this time, Ms. Bonner met with Mr. Asay to discuss the matter. She told him that she believed that under this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), an argument could be made that he had a full year to file a federal habeas petition following the conclusion of the state post-conviction process.

Shortly thereafter, on January 25, 2005, Mr. Asay wrote Ms. Bonner to advise of his instructions:

> I DO NOT CONCENT [sic] TO ANY DELAY IN FILING A Rule 2254 Petition in my case based in Carey v. Saffold.
>
> As it stands in my case under the known Application of Law and requirements of The A.E.D.P.A. legislation, I have Twenty four days to timely and properly file a Rule 2254 Petition. And I am directing you to do so accordingly.
>
> To rely on Carey v. Saffold is to unnecessarily risk my Federal Appellate review. Please do not do so.

He again copied Messrs. Moss and Westling.

Shortly thereafter, he received the January 31, 2009, letter from the clerk of the Supreme Court of Florida advising that no mandate would issue. He promptly assembled the above-referenced correspondence and prepared a detailed *pro se* filing that he sent to the clerk of the district court. He stated that his court-appointed lawyers had ignored his pleas and allowed the time for him to file a habeas petition in federal court to expire. He advised that had he known they were not going to file it on time, he would have done so himself. He advised that his

attorney had falsely led him to believe they would timely file the petition but instead abandoned him. He asked that the court allow him to file a habeas petition out of time.

The district court ordered Ms. Bonner and Mr. Westling to respond to Mr. Asay's allegations. They responded in a letter dated March 7, 2005 (after the AEDPA deadline had lapsed) that Mr. Asay was simply being "cautious" and that he actually had about five months left in the limitations period. It was not until August 15, 2005, that Ms. Bonner filed a formal habeas petition on Mr. Asay's behalf.

After initial briefing by the parties on the timing issue demonstrated that the conduct of Mr. Asay's court-appointed counsel was called into serious question, the district court appointed the undersigned attorney to represent Mr. Asay on the limited purpose of addressing the timing issue. The court eventually conducted an evidentiary hearing at which it heard live testimony by Mr. Asay (via video-conference from death row), Mr. Westling, and Ms. Bonner.

Ms. Bonner did not dispute any of the facts related above. In her defense, she explained that she had been facing personal issues that were "very severe and very overwhelming." These issues began when she came home and found her husband of 40 years lying on the floor after having suffered a stroke. She had no other family and this event was "monumental" to her, partly because she had similarly found her father on the floor after a stroke when she was only 13. The following spring, she was hospitalized with anemia, a serious concern as she had only recently overcome

a battle with cancer. Shortly after that, while she was caring for her husband, Ms. Bonner fell and suffered a "terrific closed-head injury" and also broke her arm. And shortly after that, her husband began suffering a series of seizures or possible heart attacks and ultimately required open-heart surgery.

The State argued in part that the failings of Mr. Asay's counsel amounted to nothing more than garden variety negligence, which does not support equitable tolling. But it also asked the court to consider the "possibility" that Ms. Bonner had intentionally filed the petition late "as part of a strategy to attack the AEDPA."

The court ultimately made findings of fact establishing the above-related facts. The court concluded:

> The terms "bad faith" or "dishonesty" capture Ms. Bonner's conduct and are the type of egregious conduct that rises well above professional negligence or even gross negligence. Combining this with Ms. Bonner's already noted mental impairments during this time and giving some credence to the state's view that Ms. Bonner deliberately chose to miss the limitation deadline (even against her client's expressed wishes), thereby creating "divided loyalty" between Mr. Asay and Ms. Bonner, and even the high bar set by [Eleventh Circuit precedent] is met. Recognizing that equitable tolling applies "only in truly extraordinary circumstances" and "is typically applied sparingly," the circumstances that this Petitioner has proven, which will hopefully be rare, meet this test. Moreover, it is hard to imagine how a Petitioner could be more diligent in the pursuit of a timely federal habeas filing.

(Pet. App. A-59-60 (citations omitted).)

D. The Other Two Cases in the "Unfortunate Trilogy"

In addition to Mr. Asay's case, the district court (through the same judge) considered two other Florida death row inmates whose counsel had missed the AEDPA deadline: William Greg Thomas and Floyd Damren. The court appointed the undersigned counsel to represent all three defendants and conducted

evidentiary hearings on the equitable tolling question in all three cases at the same time. The court summarized its ultimate conclusions in the three cases as follows:

> The Court is aware that the Eleventh Circuit has set a very high threshold to meet the requirements of equitable tolling based on a habeas petitioner's counsel's misfeasance. In the first case of this unfortunate trilogy, *Damren*, the Court has concluded that equitable tolling was not appropriate, notwithstanding the gross negligence of petitioner's counsel. However, acknowledging that the line between "gross negligence" and "bad faith" or "divided loyalty" is hard to draw, the Court concludes that *Thomas* and *Asay* are the rare cases where equitable tolling should be applied.

Mr. Thomas was also represented by Mr. Westling and Ms. Bonner, and the district court found that equitable tolling should apply for largely the same reasons as in Mr. Asay's case. Mr. Thomas's case has followed the same procedural posture since then: the district court certified its equitable tolling ruling for an interlocutory appeal under 28 U.S.C. § 1292(b), the court of appeals denied the State's petition for leave to appeal, and the State has petitioned this Court for a writ of certiorari. The main difference between Mr. Thomas' and Mr. Asay's cases is that the issue involving the Supreme Court of Florida failing to issue a mandate is not present in Mr. Thomas' case. Mr. Thomas' petition is pending in this Court as Case Number 09-234, and he is preparing a brief in opposition that concedes that a writ of certiorari should issue to decide the equitable tolling question presented in the State's petitions in his case and in Mr. Asay's case.

E. Deficiencies in Florida's Provision of Counsel for Post-Conviction Proceedings in Capital Cases

Messrs. Asay, Thomas, and Damren are not the only Florida death row inmates who have missed the AEDPA deadline and face the possibility of having no

federal review whatsoever due to the conduct of their court-appointed counsel. At the evidentiary hearing in these cases, Mr. Asay identified 21 defendants currently on Florida's death row whose court-appointed counsel failed to file their federal habeas petitions within the AEDPA limitations period.

Indeed, Florida stands out as providing an alarmingly deficient level of representation to capital defendants. The state legislature originally created the CCRC to provide effective representation to capital defendants who could not afford their own counsel to represent them in post-conviction proceedings in state and federal court. The CCRC was originally divided into three regional offices, but the office for the northern region of Florida was disbanded. Thus, capital defendants from this part of the state are no longer represented by CCRC attorneys. Instead, they are represented by attorneys appointed from a state registry of private attorneys.

Experience has shown, however, that the registry system has been a disaster in practice. The district judge in this case noted that it was very difficult to find competent attorneys to accept these appointments. And there is ample evidence that registry counsel provide a much lower level of competent representation than CCRC attorneys. For example, even though the majority of Florida death row inmates are still represented by CCRC counsel from the other two regions, 19 out of the 21 death row inmates who have missed their AEDPA filing deadlines were represented by registry counsel.

A recent report by the American Bar Association titled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report" (the "ABA Report")[3] concluded:

> Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

The report notes that Florida has sentenced more innocent defendants to die than any other state.[4] The report concludes that Florida suffers from a lack of qualified and properly monitored registry attorneys to handle cases outside of the CCRC regions and that the state provides grossly inadequate compensation to attract high quality lawyers to the registry. In the average capital case, registry counsel can expect to be paid about $25 an hour.[5]

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[3] This report can be found at http://www.abanet.org/moratorium/assessmentproject/florida/report.pdf.

[4] According to the report, since 1973, 22 Florida death row inmates have been exonerated, and 60 have been executed.

[5] Registry attorneys are paid $100/hour, but the total fee is capped at $84,000. Fla. Stat. § 27.711(4) (2009); *see also* Fla. Stat. § 27.7002(5) (2009) (prohibiting use of state funds to exceed the cap); *but see Olive v. Maas*, 811 So. 2d 644, 653-54 (Fla. 2002) (construing § 27.711(4) to authorize trial courts to award higher fees in capital cases where extraordinary or unusual circumstances exist);

And a 2007 audit of Florida's capital collateral counsel system (the "CCRC Audit"),[6] demonstrates the tremendous disparity in the comparative competence of CCRC and registry counsel. For example, the report found that CCRC counsel timely file federal habeas petitions 93% of the time, compared to registry counsel who file timely habeas petitions only 73% of the time. As of June 2006, eight Florida death row inmates had lost their right to federal review because their counsel failed to timely file their habeas petitions, and seven of those inmates were represented by registry counsel. Registry attorneys interviewed far fewer witnesses and used far fewer experts than CCRC counsel. Registry attorneys spent about one-fifth the time per case than CCRC attorneys. Unsurprisingly, defendants represented by registry counsel prevailed in a far smaller percentage of cases.

Maas v. Olive, 992 So. 2d 196, 198 (Fla. 2008) (construing § 27.7002(5) to not apply where trial court has found extraordinary or unusual circumstances).

The ABA report notes that the Spangenberg Group, which it considers to be the nation's leading expert on the delivery of indigent defense services, estimates that 3,300 attorney hours are required in the average capital post-conviction process at the state level alone. Thus, in the average capital case – i.e., a case not presenting extraordinary or unusual circumstances – a registry attorney can expect to be paid about $25/hour.

[6] The report was prepared by the Florida Auditor General pursuant to Fla. Stat. § 27.701(2) (2005). It can be found at www.myflorida.com/audgen/pages/pdf_files/2007-092.pdf.

Finally, justices of the Supreme Court of Florida have been outspoken in their criticism of the quality of registry counsel. Then-Chief Justice Barbara Pariente wrote a letter to the chair of the state senate committee on criminal appropriations urging that the disbanded CCRC regional office be reinstated based on the unanimous view of the justices of that court that the private attorney registry system in north Florida has been a failure. And then-Justice Raoul Cantero testified to a legislative committee that the representation provided to capital defendants by registry counsel constituted "some of the worst lawyering" he has ever seen.

All of this information was presented to the district court below, although the court found much of it to be irrelevant to the issue of whether Mr. Asay was entitled to equitable tolling.

ARGUMENT

I. The Issue of Whether § 2254(i) Bars Equitable Tolling Based on Attorney Misconduct Warrants Review by This Court Because It Is an Important Question of Federal Law on Which the Courts of Appeals Are Deeply Divided.

While he disputes the State's position on the merits, including its assertion that the ruling below is in conflict with any decision from this Court, Mr. Asay concedes that there is a deep split among the courts of appeals on the issue of whether attorney misconduct can support equitable tolling of the AEDPA limitations period. He also concedes that this is an issue of paramount importance that merits prompt review by this Court.

Mr. Asay further notes that the issue is best decided in a case like this one – a capital case involving the misconduct of court-appointed registry counsel from Florida. Because "death is different," capital cases frame the issue in its most compelling terms and implicate arguments not available to non-capital defendants seeking the benefit of equitable tolling. *Compare Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir.) (holding that a relatively more lenient standard for equitable tolling should apply in capital cases), *cert. denied*, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001), *with Rouse v. Lee*, 339 F.3d 238, 254-55 (4th Cir. 2003) (*en banc*) (concluding that this Court's "death is different' precedents only apply to issues regarding procedural safeguards at trial and not in appellate or post-conviction proceedings), *cert. denied*, 541 U.S. 905, 124 S. Ct. 1605, 158 L. Ed. 2d 248 (2004).

Cases like this one that involve the conduct of court-appointed counsel raise questions regarding the applicability of agency theory, which is the basis for some courts' refusal to apply equitable tolling based on attorney conduct. *Compare Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) (holding that because an attorney is the agent of the client, a habeas petitioner cannot obtain equitable tolling based on even intentional misconduct of his counsel), *with Downs v. McNeil*, 520 F.3d 1311, 1320-21 (11th Cir. 2008) (rejecting reasoning in *Powell* because of exceptions to the rule that an agent's actions are attributable to his principal and holding that serious attorney misconduct overcomes the effect of agency)

Finally, the issue is perhaps best framed in a case involving serious misconduct by Florida registry counsel. Given the demonstrable failings in this

system and the grossly disparate quality of representation by registry counsel compared to CCRC counsel, serious equal protection and due process questions can arise if § 2244(i) is interpreted not just to preclude habeas *relief* for ineffective assistance of counsel, but to preclude habeas *review* where the incompetence and malfeasance of counsel resulted in an untimely habeas petition.

Whether in this case or another,[7] this Court should determine whether and under what circumstances a capital defendant may be entitled to equitable tolling based on the conduct of his or her counsel.

II. Due to the Mandate Issue in this Case, the Court May Conclude that the Pending *Thomas* Case Provides a Better Vehicle to Decide the Equitable Tolling Issue.

While Mr. Asay agrees with the State that the equitable tolling question merits review by this Court, a unique feature of this case may warrant the Court

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[7] There are two other petitions pending in this Court by Florida capital inmates who missed their AEDPA deadline due to the actions of their court-appointed registry counsel. In addition to the companion case of *McNeil v. Thomas*, Case No. 09-234, Albert Holland has filed a petition for writ of certiorari in *Holland v. Florida*, Case No. 09-5327.

Holland is less suited as a vehicle to decide the issue because it did not involve affirmative misconduct by counsel. Rather, the question presented in that case is whether the "gross negligence" of counsel can support equitable tolling. Additionally, while the parties in both this case and *Thomas* agree that certiorari review is appropriate, the State opposes certiorari in *Holland*.

granting certiorari in the related *Thomas* case and keeping Mr. Asay's case pending. Even if the Court were to conclude that equitable tolling is never available based on the misconduct of counsel, the ultimate ruling below in this case would still stand. In a footnote, the district court reached an alternative holding that Mr. Asay's petition was timely regardless of his attorney's conduct because the Supreme Court of Florida never issued a mandate after affirming the trial court's denial of relief under *Ring*. (Pet. App. at A-60-61 n.25.)

Both the Eleventh Circuit and this Court have held that a post-conviction proceeding initiated in a Florida state court is still pending for purposes of § 2244(d)(2) even after an appellate court affirms the denial of relief and that it remains pending until the appellate court issues its mandate. *Day v. McDonough*, 547 U.S. 198, 203, 126 S. Ct. 1675, 1680, 164 L. Ed. 2d 376 (2006) (citing *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000)).

Unless and until *Nyland* and *Day* are overturned, binding precedent in the district court dictates that Mr. Asay's final application for state post-conviction review remains pending to this day. At the very least, the application remained pending – and therefore tolled the AEDPA deadline under § 2244(d)(2) – until the clerk of the supreme court indicated that no mandate would issue. This matter may warrant certification to the Supreme Court of Florida to resolve the apparent conflict between its disposition of Mr. Asay's appeal and published decisions of that court and lower Florida courts that all indicate that an appeal does not become final in Florida until a mandate issues. *See, e.g., H.R.S. v. South Beach Pharmacy*, 635

So. 2d 117, 120 (Fla. Dist. Ct. App. 1994) ("Only upon issuance of the mandate does the appellate court's decision become final."); *State ex rel. Davis v. Clearwater*, 146 So. 836, 837 (Fla. 1933) (Whitfield, J., concurring) ("Where on appeal or writ of error, the Supreme Court affirms or reverses a judgment, decree or order, such court does not lose jurisdiction of the cause until the mandate of the Supreme Court is duly remitted to, and received in, the office of the clerk of the lower court.").

The point is that if the Court were to grant review in this case and ultimately find in favor of the State on the primary issue presented, it would have to also address the somewhat complicated mandate issue. Thus, this case may not be the best vehicle for the Court to decide the tolling issue. The *Thomas* case may be a better vehicle because it does not have the same complication, but otherwise raises largely the same issue of equitable tolling based on attorney misconduct.

III. The Court of Appeals' Denial of the State's Petition for Leave to Appeal Under 28 U.S.C. § 1292(b) Does Not Present a Vehicle Problem.

The State's petition correctly states that this Court has jurisdiction over this case, but it glosses over the fact that the court of appeals denied the State's petition for permission to appeal under 28 U.S.C. § 1292(b). This Court has statutory certiorari jurisdiction to review "[c]ases in the courts of appeal." 28 U.S.C. § 1254(1) (2006).[8] An argument could be made that because the court of appeals denied the

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[8] The full text of the relevant statutory provision is as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

State's application for permission to appeal under § 1292(b),[9] this case was never "in the courts of appeal." For example, the Court once ruled that it lacked statutory certiorari jurisdiction in habeas cases where the court of appeals denied a certificate of probable cause, which was a prerequisite for the court of appeals to have appellate jurisdiction. *House v. Mayo*, 324 U.S. 42, 44, 65 S. Ct. 517, 519, 89 L. Ed. 739 (1945), *overruled by Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

The Court does not appear to have ever discussed the applicability of § 1254(1) when a court of appeals denies an application for review under § 1292(b), but it has exercised its jurisdiction at least once to review a case in that procedural

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> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ....

28 U.S.C. § 1254 (2006).

[9] This statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, it shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (2006).

posture. In *Tidewater Oil Co. v. United States*, 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972), the Court reviewed and affirmed a court of appeals' decision to deny leave to appeal pursuant to § 1292(b). Although it did not address the basis for its own jurisdiction, the Court held that the court of appeals properly denied leave to appeal because interlocutory appeals are prohibited in government civil antitrust suits pursuant to section 2 of the Expediting Act of 1903, 32 Stat. 823. *Id.* at 173-74, 93 S. Ct. at 421.

Perhaps more importantly, the Court has reconsidered and overruled its holding in *House v. Mayo* and has concluded that it does have jurisdiction under § 1254(1) over a habeas appeal even where the court of appeals denied a certificate of appealability. *Hohn*, 524 U.S. at 253, 118 S. Ct. at 1978. In *Hohn*, the Court concluded that the court of appeals' consideration and denial of the habeas petitioner's request for a certificate of appealability constituted a "case in the court of appeals" and therefore the Court had jurisdiction to review the case. *Id.* at 241-45, 118 S. Ct. at 1972-74. The Court emphasized that the matter had been handled by the court of appeals in a manner that indicated it was a case in that court: the matter was entered on the court of appeals' docket; it was submitted to a panel of three judges from the court of appeals, the matter was decided by an opinion; there was a dissent; the court of appeals entered a judgment and a mandate; and the court of appeals considered and rejected a motion for rehearing. *Id.* at 242; 118 S. Ct. at 1973.

Nearly all of those same events happened in this case. The petition was docketed by the clerk of the court of appeals just like any other appellate proceeding, and it was assigned a docket number by the clerk. It was submitted to a panel of three judges of the court of appeals, and the panel issued an order denying the petition. The order was entered under the court's seal, its caption indicated that it was being entered in an "Appeal from the United States District Court for the Middle District of Florida" and referred to the State as the "Appellants." The order was accompanied by a letter from the clerk stating that the panel's order "is issued as the mandate of this court." The letter advised that a motion to reconsider could be filed within 21 days, and the three-judge panel entertained and denied a motion for reconsideration.

Commentators have agreed that the reasoning in *Hohn* should apply to other cases in which the court of appeals denied permission to appeal. *See* Robert L. Stern et al., *Supreme Court Practice* § 2.2 at 71 (8th ed. 2002) (concluding in light of *Hohn* that "the Court has given a broad interpretation to the word 'cases' so as to include not only a full-blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals"); 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4036 n.24 (3d ed. 2007) (concluding that in light of the reasoning in *Hohn*, § 1254(1) likely grants certiorari jurisdiction where the court of appeals denied leave to appeal under § 1292(b) or "any other statute requiring leave to appeal"); Scott E. Gant, *The Law of Unintended Consequences: Supreme Court*

Jurisdiction over Interlocutory Class Certification Rulings, 6 J. App. Prac. & Process 249 (2004) (arguing that the Court has jurisdiction to review district court class certification order even where the court of appeals denies permission to appeal under Fed. R. App. P. 23(f) and noting that it likely also has jurisdiction where the court of appeals denied review under § 1292(b)).

If the Court has concerns that, notwithstanding *Hohn*, it may not have jurisdiction over this case, the jurisdictional questions would be best answered at the merits stage and not at the certiorari stage, especially where, as here, both parties agree the Court has jurisdiction. *Cf. Hohn*, 524 U.S. at 240-41, 118 S. Ct. at 1972 (noting that since petitioner and respondent agreed there was jurisdiction, best course was to grant certiorari to decide question and appoint an *amicus curiae* to argue that the Court lacked jurisdiction). Because this issue, by definition, will never arise in the courts of appeals and can be decided by this Court only, the jurisdictional wrinkle actually presents an additional reason for the Court to grant certiorari.

Whether the court of appeals should have granted leave to appeal is not an issue meriting review by this Court. Section 1254(1) grants jurisdiction to this Court to review "cases" in their entirety, not just the specific ruling of the court of appeals. Thus, for example, this Court has ruled on the merits of habeas appeals even where the court of appeals denied a certificate of appealability. *E.g., Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000). Indeed, so long as the case is in the court of appeals, this Court is free to review the district court's

order directly even before the court of appeals has disposed of the appeal. *See* 28 U.S.C. § 1254(1) (providing jurisdiction either "before or after rendition" of the court of appeals' decision). *See generally* Stern et al., *supra*, §§ 2.3-2.4 (compiling cases in which this Court has exercised its power to directly review district court decisions without the benefit of an opinion from the court of appeals). And, of course, this Court can review and even reject a district court's ruling even where the court of appeals summarily affirmed without an opinion. Stern et al., *supra*, § 2.2 at 73. *See also Forsyth v. Hammond*, 166 U.S. 506, 513, 17 S. Ct. 665, 668, 41 L. Ed. 1095 (1897) (noting that the similar antecedent to § 1254(1) "was intended to vest in this court a comprehensive and unlimited power" of review that "is not affected by the condition of the case as it exists in the Court of Appeals").

Thus, there is no reason for the Court to take up the question of the whether the court of appeals "abused its discretion" in denying the State's request for permission to appeal. Indeed, given the Eleventh Circuit's clear holdings in *Downs v. McNeil*, 520 F.3d 1311 (11th Cir. 2008), and *Holland v. McNeil*, 539 F.3d 1334 (11th Cir. 2008) (pet. for cert. pending Case No. 09-5327), *see also Melson v. Allen*, 548 F.3d 993, 1001 (11th Cir. 2008) (reiterating *Holland* standard that egregious misconduct and not simply gross negligence is required to support equitable tolling), and the egregious nature of the attorney conduct in this case, there was no reason why the Eleventh Circuit should have granted review itself. All that would have happened had the court of appeals granted the State leave to appeal is that several months would go by while the case was briefed, argued, and likely affirmed in light

of the clear holdings in *Downs*, *Holland*, and *Melson*. There is no reason for the court of appeals to further consider the equitable tolling issue before this Court decides the main question presented in the petition.

Finally, the Court should resist any temptation to wait to decide the equitable tolling issue until a final judgment is entered. While it is true that review by this Court might delay the proceedings in the district court, the State of Florida is the party who has the paramount interest in obtaining speedy resolution of capital cases. In its considered judgment, the State has decided that from a systemic point of view, that interest would best be served by the Court deciding the equitable tolling issue in this case or in *Thomas*. While Mr. Asay disagrees with the State on the merits of its argument, the State's position on the most efficient manner of determining the question should be entitled to the greatest of deference.

CONCLUSION

For the foregoing reasons, although Mr. Asay concedes that the equitable tolling issue in this case merits review and is fully prepared to defend the ruling below in this Court, the Court should grant a writ of certiorari in *McNeil v. Thomas*, Case No. 09-234, and hold this case pending until *Thomas* is decided.

Respectfully submitted,

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